Supreme Court U.S.
FILED
MAR 7 2002
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(4)

No. 00-1860

In the Supreme Court of the United States

MEMORIAL HOSPITALS ASSOCIATION, PETITIONER

v.

CAROLYN HUMPHREY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Petitioner seeks to present the following questions:

1. Whether an employer must offer a "reasonable accommodation" to an employee before terminating her employment even when the employee knows about and has previously rejected the reasonable accommodation.

2. Whether an indefinite leave of absence that might plausibly allow an employee to return to work qualifies as a "reasonable accommodation."

TABLE OF CONTENTS

	Page
Statement	1
Argument	6
I. Petitioner's first question does not warrant review	7
A. This case is not an appropriate vehicle for addressing petitioner's proposed rejected accommodation defense	8
B. As applied to circumstances like those presented here, petitioner's proposed rejected accommodation defense is not supported by the text of the ADA or the EEOC's regulations	9
C. Petitioner's first question does not raise an issue of recurring importance and there is no conflict in the circuits	13
II. Petitioner's second question does not warrant review	16
A. The question whether the ADA may require an indefinite leave of absence is not presented	17
B. The question whether an accommodation may be required if it could plausibly benefit the employee is not ripe for review	18
III. Review would be premature on either question because the case is in an interlocutory posture	19
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967)	19-20

Cases—Continued: Page

Cehrs v. *Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775 (6th Cir. 1998) 17
Duckett v. *Dunlop Tire Corp.*, 120 F.3d 1222 (11th Cir. 1997) 18
Garcia-Ayala v. *Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000) 17
Hankins v. *The Gap, Inc.*, 84 F.3d 797 (6th Cir. 1996) 13, 14
Haschmann v. *Time Warner Entm't Co.*, 151 F.3d 591 (7th Cir. 1998) 17
Hudson v. *MCI Telecomms. Corp.*, 87 F.3d 1167 (10th Cir. 1996) 18
Mole v. *Buckhorn Rubber Prods., Inc.*, 165 F.3d 1212 (8th Cir.), cert. denied, 528 U.S. 821 (1999) 15, 16
Mustafa v. *Clark County Sch. Dist.*, 157 F.3d 1169 (9th Cir. 1998) 18, 19
Rascon v. *U.S. West Communications, Inc.*, 143 F.3d 1324 (10th Cir. 1998) 17
Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 19

Statutes and regulation:

American with Disabilities Act of 1990, Tit. I, 42 U.S.C. 12111 *et seq.* 1, 2
42 U.S.C. 12111(8) 1
42 U.S.C. 12112(a) 1
42 U.S.C. 12112(b)(5)(A) 2, 11
42 U.S.C. 12116 2
Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*:
§ 504, 29 U.S.C. 794 (1994 & Supp. V 1999) 19
§ 504(d), 29 U.S.C. 794(d) 19

Statutes and regulation—Continued: Page

29 C.F.R.:
Pt. 1630 2
Section 1630.9 11
Section 1630.9(d) 12
App. § 1630.2(o) 2, 16
App. § 1630.9 12

Miscellaneous:

56 Fed. Reg. 35,726 (1991) 2

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Title I of the Americans with Disabilities Act of 1990 (ADA), provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to * * * discharge of employees * * * and other terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). A "qualified individual with a disability" is an individual with a disability "who, with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. 12111(8). The ADA defines illegal discrimination to include "not making reasonable accommodations

to the known physical or mental limitations of an otherwise qualified individual with a disability," unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the] covered entity." 42 U.S.C. 12112(b)(5)(A). The ADA requires the Equal Employment Opportunity Commission (EEOC) to issue regulations to carry out the provisions of Title I. 42 U.S.C. 12116. Following public notice and comment, the EEOC issued such regulations. 56 Fed. Reg. 35,726 (1991); 29 C.F.R. Pt. 1630. The Appendix to the regulations lists "leave" as one type of reasonable accommodation. 29 C.F.R. Pt. 1630, App. § 1630.2(o).

2. Carolyn Humphrey (respondent) worked as a transcriptionist for Memorial Hospitals Association (petitioner). Pet. App. 2a. In 1989, respondent began to engage in a series of obsessive rituals that made it difficult for her to get to work on time, or on some occasions, at all. *Ibid.* Petitioner issued a series of disciplinary warnings to respondent for tardiness and absenteeism and required her to attend counseling sessions. *Id.* at 2a-3a. Respondent asked petitioner whether she could see a psychiatrist for evaluation, and petitioner referred her to Dr. John Jacisin. *Id.* at 3a. Dr. Jacisin diagnosed respondent as suffering from Obsessive Compulsive Disorder (OCD), and sent a letter to petitioner explaining that the disorder was contributing to respondent's tardiness. *Ibid.* He also stated:

> I believe that we can treat this, although, the treatment may take a while. I do believe that she would qualify under the Americans with Disability Act, although, I would like to see her continue to work, but if it is proving to be a major personnel problem,

> she may have to take some time off until we can get the symptoms better under control.

Id. at 4a.

Petitioner met with respondent to discuss Dr. Jacisin's letter. Pet. App. 4a. Petitioner claims that it offered respondent a leave of absence, and that she rejected the offer; respondent claims that no such offer was made. *Ibid.* It is undisputed that petitioner and respondent ultimately agreed on an accommodation under which respondent could report to work at any time as long as she worked an eight-hour shift once she arrived. *Id.* at 5a.

Respondent nonetheless continued to miss work, and after more than three months, she asked for permission to work at home. Pet. App. 5a. Although petitioner permits some transcriptionists to work at home, it denied respondent's request because of her prior disciplinary warnings for tardiness and absenteeism. *Id.* at 6a. Petitioner did not offer an alternative accommodation or suggest that it would be willing to work further with respondent to identify another accommodation. *Ibid.* Instead, petitioner reminded respondent that it had accommodated her through a flexible work-time schedule and suggested that the matter was closed. *Ibid.* Respondent continued to perform well when she was able to make it to work. *Id.* at 6a-7a. She exceeded expectations concerning productivity levels and error rates, and was able to complete particularly difficult transcripts. *Id.* at 7a. Nonetheless, after she missed two additional days of work, petitioner fired her. *Id.* at 8a.

3. Respondent filed suit against petitioner, alleging, *inter alia*, that petitioner had violated the ADA by failing to provide her with a leave of absence or per-

mitting her to work at home. Pet. App. 8a. The district court granted petitioner's motion for summary judgment. *Id.* at 25a-47a. Respondent did not file a cross-motion for summary judgment.

The district court first held that a leave of absence may be a reasonable accommodation in some circumstances and that, although the ADA likely did not require an indefinite leave of absence, petitioner could not prevail on that ground. Pet. App. 32a. The court explained that "[n]othing prevented [petitioner] from granting [respondent] a leave of absence with a specific time period." *Id.* at 34a (emphasis omitted). The district court nonetheless granted petitioner's motion for summary judgment, finding "dispositive the facts that [respondent] was initially offered a leave of absence and rejected it, and then failed to request a leave of absence subsequently." *Id.* at 45a.[1]

4. A panel of the Ninth Circuit reversed. Pet. App. 1a-24a. The court first held that a leave of absence may be a reasonable accommodation under the ADA when such a leave would permit an employee to perform the essential functions of the job upon the employee's return. *Id.* at 14a. The court of appeals further held that an employee is not required to show that a leave of absence "is certain or even likely to be successful," but only that a leave "could have plausibly enabled" successful performance. *Id.* at 15a. The court concluded that respondent satisfied that burden at the summary judgment stage through the introduction of Dr. Jacisin's statements that respondent's condition

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[1] The district court also held that an at-home work arrangement would not have been a reasonable accommodation for respondent. *Id.* at 34a-35a. Respondent did not raise that issue on appeal, *id.* at 21a n.6, and it is not presented here.

was treatable and that she might have to take some time off in order to get her symptoms under control. *Ibid.*

The court of appeals identified the remaining question as a purely legal one: "was [petitioner] obligated to suggest a leave of absence or to explore other alternatives in response to [respondent's] request for a work-at-home position, or was it [respondent's] burden to make an express request for a leave of absence before she was terminated." Pet. App. 18a. The court concluded that petitioner "had an affirmative duty under the ADA to explore further methods of accommodation before terminating" respondent. *Ibid.*

The court of appeals held that "[o]nce an employer becomes aware of the need for accommodation, that employer has a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations." Pet. App. 18a. That obligation, the court concluded, "extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed." *Id.* at 19a. The court explained that respondent had such a continuing obligation here because Dr. Jacisin's letter put petitioner on notice that respondent might eventually need a leave of absence, respondent's acceptance of a flexible work-time arrangement did not forfeit her right to an alternative accommodation upon the failure of that arrangement, and respondent eventually notified petitioner that the flexible work-time arrangement was not working out. In those circumstances, the court held, once respondent stated that the flexible work-time arrangement was not working out and asked for an at-

home work arrangement, petitioner had an "obligation to engage in a cooperative dialogue with [respondent]," rather than suggesting "that the matter was closed." *Id.* at 20a-21a.

The court further held that "[g]iven [petitioner's] failure to engage in the interactive process, liability is appropriate if a reasonable accommodation without undue hardship to the employer would otherwise have been possible." Pet. App. 21a. Because the court had concluded (as part of its "qualified individual" analysis) that a leave of absence was a reasonable accommodation, and because petitioner conceded that a leave of absence would not pose an undue hardship, the court held that (assuming that respondent is a qualified individual with a disability) petitioner violated the ADA's reasonable accommodation requirement. *Id.* at 22a.

ARGUMENT

This case is not an appropriate vehicle for resolving the question whether an employer violates the ADA when it fails to offer an accommodation that an employee knows about and has previously rejected. Neither the court of appeals' decision nor the underlying facts squarely present that question. Respondent was never presented with a clear choice between a leave of absence or no accommodation. At most, respondent constructively rejected a leave of absence by preferring another accommodation that kept her on the job. As applied to such cases, petitioner's proposed rejected accommodation defense is not supported by the text of the ADA or the EEOC's regulations. In addition, petitioner's first question has not emerged as an issue of recurring importance, and there is no conflict in the circuits. Accordingly, review on petitioner's first question is not warranted.

Review is also not warranted on the question whether an indefinite leave of absence that might plausibly allow an employee to return to work qualifies as a reasonable accommodation. The court of appeals did not decide whether the ADA may require an *indefinite* leave of absence, and the facts of the case do not clearly raise that issue. The Ninth Circuit's holding that an accommodation may be required if it could plausibly benefit the employee conflicts with the Eleventh Circuit's description of the applicable standard. But it also conflicts with a prior Ninth Circuit decision. Because the Ninth Circuit may well resolve that intra-circuit conflict in a way that eliminates the circuit conflict, intervention by this Court at this time would be premature.

This case is also in an interlocutory posture. There is no reason to depart from this Court's general practice of awaiting a final judgment before it grants review.

I. PETITIONER'S FIRST QUESTION DOES NOT WARRANT REVIEW

Petitioner contends (Pet. 13) that the court of appeals held that it could be liable under the ADA for failing to offer respondent a leave of absence even though respondent knew about and had previously rejected that accommodation. Based on that understanding of the court of appeals' decision, petitioner seeks review of the question whether an employer violates the ADA when it fails to offer an accommodation that an employee knows about and has previously rejected. For several reasons, review of that question is not warranted in this case.

A. This Case Is Not An Appropriate Vehicle For Addressing Petitioner's Proposed Rejected Accommodation Defense

First, this case is not an appropriate vehicle for resolving petitioner's first question because the court of appeals adopted a theory of liability that differs from the one that petitioner attributes to it. The court of appeals held that petitioner could be liable under the ADA for failing to participate in cooperative discussions with respondent about possible accommodations under circumstances in which a leave of absence would have been a reasonable accommodation, not for failing to offer that specific accommodation as such. Pet. App. 20a-21a. Liability flowed from petitioner's failure to consider any alternative to respondent's suggested work-at-home arrangement, not from the failure to offer a leave of absence.

Thus, the court identified the relevant legal inquiry in the following terms: "was [petitioner] obligated to suggest a leave of absence *or to explore other alternatives* in response to [respondent's] request for a work-at-home position, or was it [respondent's] burden to make an express request for a leave of absence before she was terminated." *Id.* at 18a (emphasis added). It resolved that question by holding that petitioner "had an affirmative duty under the ADA *to explore further methods of accommodation* before terminating [respondent]." *Ibid.* (emphasis added). The court specifically explained that petitioner's "failure to explore with [respondent] the possibility of other accommodations, once it was aware that the initial arrangement was not effective, constitutes a violation of its duty regarding the mandatory interactive process," and that "[g]iven [petitioner's] failure

to engage in the interactive process, liability is appropriate if a reasonable accommodation without undue hardship to the employer would otherwise have been possible." *Id.* at 21a. The court then concluded that "a leave of absence was a reasonable accommodation." *Id.* at 21a-22a. Accordingly, petitioner's first question is not squarely presented.

In addition, in the circumstances of this case, petitioner's focus on respondent's previous rejection of a leave of absence in the first question has an abstract and hypothetical quality. Respondent takes issue with the basic premise of this question—she denies that petitioner offered her a leave of absence which she then rejected. Pet. App. 4a. Although the district court held that respondent's evidence did not create a material issue of fact on that issue, *id.* at 42a, the court of appeals did not affirm that holding. Instead, it stated that "this factual dispute is *not material* to our ruling on appeal." *Id.* at 4a (emphasis added). There has therefore been no definitive resolution of the factual issue that underlies petitioner's first question. Equally important, the very fact that the Ninth Circuit deemed the factual dispute concerning whether a leave of absence has been previously offered and rejected "not material" to "its analysis" demonstrates that this case is a poor vehicle to consider whether such a prior offer and rejection gives an employer an immunity from ADA liability.

B. As Applied To Circumstances Like Those Presented Here, Petitioner's Proposed Rejected Accommodation Defense Is Not Supported By The Text Of The ADA Or The EEOC's Regulations

Even accepting the district court's assessment of the undisputed evidence, respondent rejected a leave of

absence only in the sense that when petitioner presented her with a choice between a leave of absence and a flexible start-time arrangement, she chose the latter. Pet. App. 39a-43a. Respondent never suggested that if her flexible start-time arrangement ultimately failed, she would not accept a leave of absence. *Ibid.* Nor did petitioner ever present respondent with a clear choice between a leave of absence or no accommodation. At most, this case involves a "constructive" rejection of a leave of absence in light of respondent's initial preference for a flexible work schedule.

It is far from clear why respondent's initial preference for an accommodation that allowed her to continue to work despite her disability (which is the basic goal of the ADA) should excuse any further obligation on the parties to find a reasonable accommodation if the initial accommodation proves inadequate. That is particularly true here given that (1) it became apparent to petitioner at some point that respondent's flexible work-time arrangement was not working out, (2) respondent asked petitioner for a new accommodation, and (3) petitioner knew from Dr. Jacisin's letter that respondent might need a leave of absence if her initial accommodation was not successful. *Id.* at 19a-21a. Nor is it clear why respondent should bear responsibility for having failed to ask for a leave of absence when she affirmatively asked for a new accommodation, namely, work at home. At the very least, the question whether, under those particular circumstances, an employer may be liable under the ADA for failing to provide a reasonable accommodation would seem to require a fact-intensive inquiry, rather than the application of a mechanical rule.

Petitioner nonetheless seeks a new per se rule that an employer may *never* be liable for failing to make an accommodation that an employee knows about and has rejected. At least as applied to cases where an employee has not categorically rejected the accommodation, but at most has constructively rejected the accommodation by affirmatively accepting a less drastic accommodation first, petitioner's proposed rule cannot be derived from the text of the ADA.

The ADA defines unlawful discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability," unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the] covered entity." 42 U.S.C. 12112(b)(5)(A). Under the text of the ADA, an employer has no statutory duty to accommodate an employee unless it "know[s]" about the employee's "physical or mental limitations." But once an employee provides that information, the statutory text contemplates that the employer shall have primary responsibility for identifying and implementing an appropriate "reasonable accommodation." The text would not support holding an employer liable for failing to a make a reasonable accommodation that the employer offered and the employee *categorically* rejected. See 29 C.F.R. 1630.9. However, nothing in the statutory text suggests that an employer may never be liable for failing to make an otherwise reasonable accommodation simply because an employee previously preferred a less drastic accommodation.[2]

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[2] As petitioner notes (Pet. 18) the EEOC's regulations provide that if an individual with a disability "rejects a reasonable accommodation * * * that is necessary to enable the individual to

Nor is there support for such a rule in EEOC's interpretive guidance. The EEOC has stated in its interpretive guidance that "[o]nce a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation." 29 C.F.R. Pt. 1630, App. § 1630.9, at 364. The EEOC has further explained that "[i]f a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship." Pet. App. 63a-64a. Nothing in the EEOC's interpretive guidance suggests that an employer may rule out an otherwise appropriate accommodation in all cases simply because an employee chose to try a less drastic accommodation first. Thus, as applied to cases where an employee does not categorically reject an accommodation, but simply previously preferred a less drastic accommodation, petitioner's proposed per se rule is supported by neither the text of the ADA nor EEOC's interpretation of the Act.

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perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability." 29 C.F.R. 1630.9(d). But respondent did not "reject[]" a leave of absence in the sense in which that term is used in the regulations. Even accepting the district court's assessment of the evidence, she accepted petitioner's offer of a flexible start-time arrangement, without suggesting that she would be unwilling to accept a leave of absence if the initial accommodation failed and there was no other reasonable accommodation available that would keep her on the job. At no point after respondent sought a new accommodation based on the failure of the initial one did respondent "reject[]" a leave of absence.

C. Petitioner's First Question Does Not Raise An Issue Of Recurring Importance And There Is No Conflict In The Circuits

Petitioner's first question also does not raise any issue that has as yet emerged as one of recurring or widespread importance. Petitioner cites no case in which a court has adopted the per se rule it proposes in the context of an employee who has not categorically rejected a proposed accommodation, but has simply embraced an alternative accommodation that keeps the employee on the job. Indeed, petitioner cites only a single case in which an employee has sought to establish liability based on an employer's failure to offer explicitly an accommodation that the employee knew about and rejected. See *Hankins* v. *The Gap, Inc.*, 84 F.3d 797 (6th Cir. 1996).

Petitioner contends (Pet. 14-15) that the decision below conflicts with *Hankins*, but there is no conflict. *Hankins* involved a very different factual scenario. In *Hankins*, an employee asserted that The Gap violated the ADA by failing to grant her request for a transfer to another job once it became aware of her migraine condition. The Sixth Circuit held that such a transfer would not have been a reasonable accommodation. 84 F.3d at 800. The court also held that The Gap had adequately accommodated the employee's condition by allowing her to use her ordinary leave time when she experienced migraines. *Id.* at 801. The court rejected the employee's contention that The Gap had not adequately notified her of that option, which was made available to all employees, on the ground that "it should * * * have been self-evident to Hankins that going to the medical center or asking for time off is what she needed to do when a migraine occurred." *Ibid.* The

court explained that "an employer has no duty to reiterate self-evident options to an employee when she is clearly already aware of them." *Ibid.* The court also emphasized that "Hankins effectively rejected the obvious reasonable accommodations provided by The Gap," and "proposed other, more dubious accommodations instead." *Id.* at 802.

Petitioner seeks to extrapolate from *Hankins* the principle that an employer may never be liable under the ADA for failing to make an accommodation that an employee knows about and has rejected at some point in the past. But the decision does not announce any such per se rule. In effect, the employee in *Hankins* categorically rejected an obvious reasonable accommodation, while insisting on one that would not have permitted her to perform the job successfully. Moreover, there was no issue of a constructive rejection by preferring one option over another. The employee in *Hankins* never accepted any accommodation. In contrast, respondent chose an option offered by petitioner that kept her on the job, without categorically ruling out a leave of absence if that later became necessary. In addition, the key issue in *Hankins* was the employee's failure to take advantage of an existing leave program open to all employees. The employee in *Hankins* could have used her ordinary leave to accommodate her migraine condition. In contrast, respondent would have had to go outside the generally available job benefits and receive authorization for a longer leave of absence to accommodate her condition, and when respondent asked for a new accommodation, petitioner told her that it had already accommodated her through a flexible work-time arrangement and suggested to her that the matter was closed.

In asserting a split in the circuits, petitioner argues that it is irrelevant that the two courts asked different *questions*—the key point, in petitioner's view, is that they provided different *answers* when confronted with employees who "rejected" an available accommodation. See Pet. Reply Br. 5. However, the reason that the courts asked different questions is that they were confronted with very different cases. The Sixth Circuit dealt with an employee who failed to take advantage of generally available policies. The Ninth Circuit addressed an employee who preferred one option over another and then months later had another accommodation denied. Because the crucial facts in this case differ so much from those in *Hankins*, there is no reason to believe that the Sixth Circuit would have decided this case any differently from the Ninth Circuit. Nor is there any reason to believe that the Ninth Circuit would have decided *Hankins* any differently from the Sixth Circuit.

For similar reasons, the decision below does not conflict (Pet. 15) with the Eighth Circuit's decision in *Mole* v. *Buckhorn Rubber Products, Inc.*, 165 F.3d 1212, cert. denied, 528 U.S. 821 (1999). In *Mole*, the Eighth Circuit held that an employer had not violated its duty to accommodate a disabled employee. The court based its decision on the particular facts of the case, and not on any broad legal principle. In particular, the court emphasized that (1) the employer repeatedly attempted to accommodate the employee, (2) the employee never advised her employer that a different accommodation might be necessary, and (3) the employer made good faith efforts to help the employee determine if other accommodations might be needed. *Id.* at 1218. In those circumstances, the court con-

cluded, the employee could not stand silent, expecting the employer to "read her mind." *Ibid.*

The situation here is different from that in *Mole* in every relevant respect. While the employer in *Mole* made numerous attempts to accommodate the disabled employee, petitioner made a single attempt. While the employee in *Mole* did not inform her employer that she needed a new accommodation, respondent informed petitioner that she needed a new accommodation. While the employer in *Mole* made good faith attempts to determine if other accommodations might be needed, when respondent asked for a new accommodation, petitioner failed to initiate cooperative discussions and instead suggested that the matter was closed. While the employer in *Mole* had no information that another specific accommodation might be effective, petitioner knew from Dr. Jacisin's letter that respondent might need a leave of absence. The Eighth Circuit's fact-specific conclusion in *Mole* that the employer in that case did not violate the ADA therefore does not conflict with the court of appeals' fact-specific conclusion in this case that petitioner violated the ADA.

II. PETITIONER'S SECOND QUESTION DOES NOT WARRANT REVIEW

Petitioner also seeks review of the court of appeals' holding that a leave of absence would have been a reasonable accommodation for respondent. Petitioner objects to the court of appeals' holding on two related grounds.[3]

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[3] Petitioner does not challenge the court of appeals' holding that a leave of absence may be a reasonable accommodation in some circumstances. That holding is consistent with EEOC's interpretive guidance, 29 C.F.R. Pt. 1630, App. § 1630.2(o), at 357,

A. The Question Whether The ADA May Require An Indefinite Leave Of Absence Is Not Presented

Petitioner first contends (Pet. 19-26) that the Ninth Circuit held, in conflict with other circuits, that an *indefinite* leave of absence may be a reasonable accommodation. But the Ninth Circuit did not adopt any such holding. Its opinion simply does not address whether an indefinite leave may be a reasonable accommodation. Petitioner complains (Pet. 19-20) that the court of appeals' silence on the issue amounts to a holding that an "indefinite" leave of absence may be a reasonable accommodation. But the failure to address an argument is not a holding. However desirable it may have been for the Ninth Circuit to address petitioner's argument that an employee must introduce evidence on the duration of leave, the court's failure to do so cannot create binding legal precedent on that issue.

Nor is it even clear that the issue is raised by the facts of this case. Dr. Jacisin stated that a leave of absence of "some time" might be needed, but he did not suggest that the leave would have to be indefinite. Pet. App. 15a. Moreover, the district court rejected petitioner's contention that respondent sought to hold it liable for failing to offer indefinite leave, on the ground that "[n]othing prevented [petitioner] from granting [respondent] a leave of absence with a specific time period." *Id.* at 34a (emphasis omitted). In fact, as both courts below appear to have recognized, petitioner's

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and with decisions of other circuits. *Garcia-Ayala* v. *Lederle Parenterals, Inc.*, 212 F.3d 638, 647 (1st Cir. 2000); *Cehrs* v. *Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 782 (6th Cir. 1998); *Haschmann* v. *Time Warner Entm't Co.*, 151 F.3d 591, 601 (7th Cir. 1998); *Rascon* v. *U.S. West Communications, Inc.*, 143 F.3d 1324, 1333-1334 (10th Cir. 1998).

failure to respond to respondent's request to work at home with a specific leave of absence proposal pretermitted any negotiation over what length of leave would be either sufficient to address respondent's disability or reasonable in light of petitioner's overall leave policy. This case therefore does not present the question whether an indefinite leave of absence may be a reasonable accommodation.

B. The Question Whether An Accommodation May Be Required If It Could Plausibly Benefit The Employee Is Not Ripe For Review

Petitioner also challenges (Pet. 22) the Ninth Circuit's holding that a leave of absence is a reasonable accommodation if it could "plausibly" permit the employee to perform the essential functions of the job upon return, even if successful performance upon return is not likely. Although that holding conflicts with Eleventh Circuit's description of the applicable burden of proof, see *Duckett* v. *Dunlop Tire Corp.*, 120 F.3d 1222, 1226 (1997) (per curiam), review of that issue also is not warranted in this case.[4]

In holding that a plaintiff need not show that an accommodation is likely to work, the Ninth Circuit departed from its prior holding in *Mustafa* v. *Clark County School District*, 157 F.3d 1169 (1998) (per curiam). There, the Ninth Circuit held that a plaintiff "bears the initial burden of showing that the suggested accommodation would, *more probably than not*, have

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[4] The other case discussed by petitioner addresses the extent to which an employee must introduce evidence on the expected duration of her impairment. *Hudson* v. *MCI Telecomms. Corp.*, 87 F.3d 1167 (10th Cir. 1996). It does not address whether a plaintiff must prove that the success of an accommodation is likely, rather than plausible.

resulted in his ability to perform the essential functions of his job." *Id.* at 1176 (emphasis added; internal quoation marks omitted). Although *Mustafa* was decided under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (1994 & Supp. 1999), Section 504 incorporates the ADA's employment discrimination standards. See 29 U.S.C. 794(d). *Mustafa* therefore squarely conflicts with the decision in this case.

Despite that intra-circuit conflict, petitioner did not seek an en banc resolution of the issue. In future cases, parties in the Ninth Circuit will be free to urge that circuit to follow *Mustafa*, rather than the decision in this case, or alternatively to seek an en banc resolution of the issue. Accordingly, intervention by this Court at this time would be premature. That is particularly true since the Ninth and Eleventh Circuits are the only two circuits to have addressed the issue; neither court devoted much analysis to the issue; and it is not yet clear that the difference in standards has any practical significance.

III. REVIEW WOULD BE PREMATURE ON EITHER QUESTION BECAUSE THE CASE IS IN AN INTERLOCUTORY POSTURE

Review is also not warranted in this case because petitioner seeks review of an interlocutory decision reversing a grant of summary judgment. As a general matter, this Court awaits a final decision before granting certiorari in a case. *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Brotherhood of Locomotive Fireman & Enginemen* v. *Bangor & Aroostook R.R.*, 389

U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court.") (per curiam). There is no reason to depart from, and good reasons to follow, that general practice here. Further factual development on such matters as whether petitioner initially offered respondent a leave of absence, the necessary duration of respondent's leave, and the likelihood that respondent would have been able to perform the job upon her return may help to clarify the issues that are actually presented in this case. Additional decisions from the courts below on a fully developed record may also facilitate that assessment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2002